

SERVED: September 18, 1998

NTSB Order No. EA-4704

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of September, 1998

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15331
v.)	
)	
EVAN P. SINGER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on August 20, 1998, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge reversed an emergency order of the Administrator that revoked respondent's private pilot certificate for his alleged violation of section

¹An excerpt from the hearing transcript containing the initial decision is attached.

61.37(a)(6) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61).² For the reasons discussed below, the Administrator's appeal will be granted.³

The Administrator's July 10, 1998 Emergency Order of Revocation alleged the following facts and circumstances concerning the respondent:

1. At all times material herein you were and are now the holder of Private Pilot Certificate No. 46800860.

2. On or about, June 18, 1998, you were administered an FAA knowledge test at Baker's School of Aeronautics located at 1645-K Murfreesboro Road, Nashville, Tennessee 37217.

3. The above-mentioned test was for the purpose of obtaining a Ground Instructor Certificate with an Advanced rating.

4. You brought written notes or material into the testing area without being specifically authorized to do so by the Administrator.

5. You used written notes or material during the above-mentioned examination without being specifically authorized to do so by the Administrator.

The law judge concluded that, notwithstanding respondent's

²FAR section 61.37(a)(6) provides as follows:

§ 61.37 Knowledge tests: Cheating or other unauthorized conduct.

(a) An applicant for a knowledge test may not:

* * * * *

(6) Use any material or aid during the period that the test is being given, unless specifically authorized to do so by the Administrator....

³The respondent has filed a reply brief opposing the appeal.

admitted possession of unauthorized material while taking the ground instructor test, the Administrator did not adduce sufficient evidence at the hearing to prove the allegation that the respondent had used the unauthorized material. On appeal, the Administrator argues, for a variety of inter-related reasons, that the law judge did not apply the correct standard of proof in determining that the circumstantial evidence was insufficient to establish the single charge in the revocation order, which served as the complaint in the proceeding. We agree that the law judge erred in weighing the evidence.

Among the facts relevant to the narrow issue presented on this appeal are these: On entering Baker's testing area, respondent, who was carrying some blank pieces of paper, was orally cautioned that he could not bring unauthorized materials into the room,⁴ and he signed a written statement indicating his awareness and understanding of that prohibition and several others, including the advice that he could not use written notes, published materials, or other testing aids during the test.⁵ A witness appearing for the Administrator, one of three individuals observing the testing, testified that she saw respondent slide

⁴Respondent expressed the opinion to the proctor who gave him this advice that it was a "stupid" rule.

⁵See page one of Administrator's Exhibit A-3, entitled "Testing Center Regulations." Consistent with these school regulations, which the acknowledgment respondent had signed indicated would be "strictly enforced," the blank pieces of paper were taken from him.

some papers into his left pocket prior to completing the exam.⁶ The content of those papers (two measured about 3" by 5" and one about 3" square), it was shortly thereafter discovered, when respondent was asked to empty his pockets, was aviation information (such as weight and balance formulas) established by other witnesses to be related to some of the knowledge requirements for the test respondent had just taken.⁷ Respondent maintained at the hearing that he had forgotten that the notes were in his pocket and that they were actually study notes for the commercial pilot exam he had planned to take later on the same date.

The law judge did not dismiss the Administrator's charge because he credited respondent's denial of intent to cheat on the ground instructor exam. Rather, he dismissed the charge because he construed our decision in Administrator v. Hart, 3 NTSB 24, 26 (1977), to hold that a violation finding could not be made unless the circumstantial proof that respondent had used the unauthorized notes was "so compelling that no other determination

⁶All of the proctors appeared to believe that respondent did a lot of "looking around," a circumstance which aroused their suspicions about him. For part of his test he was the only person in the room, which was designed to accommodate as many as four candidates. Another individual later began a test at one of the computer stations.

⁷When reminded by a proctor that he had been told he could not bring such unauthorized materials into the testing area, a prohibition about which he had acknowledged his understanding in writing, respondent asked "Why not?"

was reasonably possible." That decision, however, as the Administrator points out, involved the Board's effort to assess a respondent's intent (i.e., scienter or "guilty knowledge"), in cases charging an airman with having made intentionally false or fraudulent statements or entries. Since intent is not an element of a charge under FAR section 61.37(a)(6), and we have never held that circumstantial proof in any other context should be similarly treated, the law judge should have simply determined whether the Administrator's case was supported by a preponderance of the substantial, reliable, and probative evidence, regardless of its direct or indirect character.⁸ In other words, the Administrator had only to show that it was more likely true than not that the respondent had used the unauthorized materials in his possession that he had been observed handling, not that no other inference could fairly be reached on the evidence.⁹

⁸Ironically, while possession of unauthorized materials may not be sufficient to prove that they were used, it would appear to be enough, coupled with a negative credibility assessment, to prove an intent to use them.

⁹The law judge suggested that the Administrator could have met the Hart test by demonstrating some "correlation" between the answers respondent gave to some of the test questions and the information on the notes. Apart from the practical difficulties of such an undertaking (except where, for example, a wrong answer reflected an erroneous formula), the suggestion contemplates far too limited a definition of "use." We think there is no doubt that unauthorized materials have been "used" under the regulation if they have been viewed or "consulted" in any way during the test period, whether or not they were helpful in answering a question. More to the point here, we believe any effort to obtain help from an unauthorized source of information or assistance, whether successful or otherwise, may well constitute

Applying the correct burden of proof to the evidence introduced by the Administrator convinces us that the charge should have been sustained.

As we read the initial decision, the law judge reasoned that, notwithstanding the testimony that respondent had been observed placing the unauthorized notes into his pocket, respondent could not be deemed to have used them since no one saw him actually look at the notes. We do not share this analysis. We do not think it matters that an inference that respondent had looked at the notes he was seen furtively returning to his pocket is not the only reasonable conclusion that could be reached. We think the unauthorized material was effectively "used" when respondent, by having the notes in his hand outside of his pocket, engaged in conduct that created the potential for improper reliance on them.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The Emergency Order of Revocation is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)
a prohibited "use" within the meaning of the regulation.